STATE OF MICHIGAN

COURT OF APPEALS

ESTATE DEVELOPMENT COMPANY,

Plaintiff-Appellant-Cross-Appellee,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Third-Party-Plaintiff-Appellee-Cross-Appellant,

v

THOMPSON-MCCULLY COMPANY, a/k/a THOMPSON-MCCULLY COMPANY, LLC,

Third-Party-Defendant-Third-Party-Plaintiff-Appellee,

v

OAKLAND EXCAVATING COMPANY, OWEN TREE SERVICE, and ACKLEY CONSTRUCTION,

Third-Party-Defendants.

UNPUBLISHED
March 24, 2011

Nos. 291989
Oakland Circuit Court
LC No. 2004-057182-CC

ESTATE DEVELOPMENT COMPANY,

Plaintiff-Appellee,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Third-Party-Plaintiff-Appellee,

v

No. 292159
Oakland Circuit Court
LC No. 2004-057182-CC

THOMPSON-MCCULLY COMPANY, a/k/a
THOMPSON-MCCULLY COMPANY, LLC,

Third-Party-Defendant-Third-Party-Plaintiff-Appellant,

v

OAKLAND EXCAVATING COMPANY, OWEN TREE SERVICE, and ACKLEY CONSTRUCTION,

Third-Party-Defendants-Appellees.

ESTATE DEVELOPMENT COMPANY,

Plaintiff,

v

No. 295968
Oakland Circuit Court
LC No. 2004-057182-CC

OAKLAND COUNTY ROAD COMMISSION,

Defendant-Third-Party-Plaintiff,

v

THOMPSON-MCCULLY COMPANY, a/k/a
THOMPSON-MCCULLY COMPANY, LLC,

Third-Party-Defendant-Third-Party-Plaintiff-Appellant,

v

OAKLAND EXCAVATING COMPANY,

Third-Party-Defendant-Appellee,

and

OWEN TREE SERVICE and ACKLEY CONSTRUCTION,

Third-Party-Defendants.

Before: MURPHY, C.J., and STEPHENS and M.J. KELLY, JJ.

PER CURIAM.

Plaintiff's real property adjacent to Mirror Lake was allegedly flooded and the wetlands thereon expanded as a result of a clogged and otherwise problematic lake drainage culvert running under Pontiac Trail Drive, which culvert typically drained waters from Mirror Lake to another lake and kept Mirror Lake at a fairly constant level. Plaintiff's position was that a road widening and resurfacing project (road project) commenced by defendant Oakland County Road Commission (OCRC) with respect to Pontiac Trail Drive caused the culvert blockage and defects in the drainage system, leading to the flooding and wetland expansion relative to the property that plaintiff desired to use for a housing development. Plaintiff filed suit against OCRC on numerous theories, including a claim of inverse condemnation. OCRC thereafter filed a third-party complaint against Thompson-McCully Company (T-M), the general contractor on the road project. And T-M in turn filed a third-party complaint against the subcontractors associated with the road project – Oakland Excavating Company (Oakland), Owen Tree Service (Owen), and Ackley Construction (Ackley). The trial court granted summary disposition in favor of OCRC on each of the counts in plaintiff's complaint and found all of the third-party complaints moot because of the summary disposition ruling. This Court eventually granted plaintiff's application for leave to appeal, reversed the order granting OCRC's motion for summary disposition on the inverse condemnation claim, and remanded the case for further proceedings. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 273383). Subsequently, the jury returned a verdict in favor of plaintiff on plaintiff's inverse condemnation claim in the amount of $1,747,000.[1] A directed verdict was entered against T-M on OCRC's third-party complaint, requiring T-M to indemnify OCRC. And the jury returned a verdict of no cause of action on T-M's third-party complaint against subcontractors Oakland and Owen.[2] In Docket No. 291989, plaintiff appeals the trial court's order denying its request for case evaluation sanctions, and OCRC cross appeals the judgment on plaintiff's inverse condemnation claim, arguing that the claim was not ripe for litigation, that there were instructional errors, that the elements of a taking were not established, that it could not be held liable for the negligence of the contractor and subcontractors, that there was prejudicial attorney misconduct, and that it was entitled to remittitur, as the damages were speculative. In Docket No. 292159, T-M contends that the trial court erred in directing a verdict against it and in favor of OCRC on the question of indemnification and that the jury no-cause verdict in favor of the subcontractors was against the great weight of the evidence. T-M also maintains that, with respect to the judgment against OCRC and in favor of plaintiff on the inverse condemnation claim, reversal is required because of instructional error, and it argues that OCRC was entitled to a judgment notwithstanding the verdict (JNOV). Finally, in Docket No. 295968, T-M appeals the trial court's order granting case evaluation sanctions in favor of

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[1] The judgment subsequently entered upon the verdict was in the amount of $2,229,910, which amount reflected the jury's verdict plus statutory prejudgment interest under MCL 600.6013.

[2] Subcontractor Ackley was dismissed as a party prior to trial pursuant to a stipulated order.

Oakland and against T-M. We affirm in all respects, except that we reverse and remand in regard to the trial court's order denying plaintiff's request for case evaluation sanctions against OCRC.

I. LAW OF THE CASE DOCTRINE

The law of the case doctrine is implicated in this appeal, so we begin by setting forth the governing principles applicable when examining the doctrine. We review de novo the legal question of whether and to what extent the law of the case doctrine applies in a given situation. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008). In *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), the Michigan Supreme Court, explaining the principles regarding the law of the case doctrine, stated:

> Under the law of the case doctrine, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals.
>
> Law of the case applies, however, only to issues actually decided, either implicitly or explicitly, in the prior appeal. [Citations, footnote, and internal quotations omitted.]

The rationale behind the law of the case doctrine is to maintain consistency and to avoid reconsideration of issues and matters previously decided during the course of a particular lawsuit. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 128; 737 NW2d 782 (2007). A conclusion by this Court that a prior appellate decision in the same case constituted error is not sufficient, in and of itself, to justify ignoring the doctrine. *Bennett v Bennett*, 197 Mich App 497, 500; 496 NW2d 353 (1992). "Normally, the law of the case applies regardless of the correctness of the prior decision, but the doctrine is not inflexible." *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). The law of the case doctrine does not preclude reconsideration of a question if there has been an intervening change of law. *Id.* For this exception to apply, the change of law must occur after this Court's initial decision. *Id*.

II. ANALYSIS

A. DOCKET NO. 291989

1. OCRC'S CROSS-APPEAL ON TRIAL AND DAMAGE ISSUES

Because the issue of whether plaintiff is entitled to case evaluation sanctions rests on the assumption that the verdict in favor of plaintiff is legally sound, we shall first address OCRC's cross-appeal, which challenges the soundness of the verdict. T-M presents arguments in Docket No. 292159 that also cast aspersion on the verdict; however, T-M's arguments mimic those

presented by OCRC. Thus, plaintiff's complaint that T-M lacks standing to raise appellate arguments on behalf of OCRC is essentially moot.

(a) RIPENESS

OCRC first argues that plaintiff's inverse condemnation claim was not ripe. OCRC asserts that plaintiff was obligated to obtain, but never did, a final decision from the City of Orchard Lake Village regarding wetland boundaries and development of the property in order to clarify the scope of any claimed limitations relative to the use of the property. OCRC contends that, absent a final decision, "there could be no proper evaluation of whether a constitutionally cognizable deprivation of property or taking occurred." Matters concerning justiciability, such as the doctrine of ripeness, are reviewed de novo on appeal. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006), overruled on other grounds in *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 371; 792 NW2d 686 (2010).

On review of OCRC's brief submitted in the prior appeal, while OCRC did not use the "ripeness" nomenclature, the substance of the argument is virtually identical to the argument presented to us. In the first appeal, the panel stated that "the trial court erred in determining that plaintiff could not establish an unconstitutional taking claim because it did not have a vested right to develop the property in the manner it desired, given that it never obtained final approval for its development plans." *Estate Dev Co*, slip op at 2. This Court held that "plaintiff's claim that its property was flooded is sufficient to establish that its vested property rights were affected." *Id.*, slip op at 3. Therefore, this Court previously addressed and ruled on the legal question now raised and then remanded the case for further proceedings. Accordingly, the law of the case doctrine is properly applied to bar OCRC's ripeness argument.

"When this Court reverses a case and remands it for a trial because a material issue of fact exists, the law of the case doctrine does not apply because the first appeal was not decided on the merits." *Brown v Drake-Willock Int'l, Ltd*, 209 Mich App 136, 144; 530 NW2d 510 (1995), citing *Borkus v Michigan Nat'l Bank*, 117 Mich App 662, 666; 324 NW2d 123 (1982). On the basis of this caselaw, OCRC argues that it would be improper to apply the law of the case doctrine, considering that the prior decision merely resulted in a remand for trial predicated on the existence of a genuine issue of material fact. We find that OCRC reads these cases much too broadly. On the particular issue of whether plaintiff had a vested right to pursue a claim for inverse condemnation absent final approval from Orchard Lake relative to a specific wetlands line, the earlier panel decided the issue as a matter of law on the merits; it did not find that there was a genuine issue of material fact on the issue. Stated otherwise, this Court made the legal determination that final approval from Orchard Lake was unnecessary to pursue the action, as the flooding of the property would form a sufficient basis to proceed. *Brown* and *Borkus* do not preclude application of the law of the case doctrine relative to every issue determined by the appellate court, especially purely legal matters, simply because the appellate court ultimately reversed on the basis that genuine issues of material fact existed. If we interpreted *Brown* and *Borkus* as suggested by OCRC, our ruling would essentially eviscerate the law of the case doctrine.

Even absent application of the law of the case doctrine, the case was ripe to litigate. With respect to the doctrine of ripeness, it precludes the adjudication of hypothetical or contingent claims before an actual injury has been sustained, and an action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all. *Michigan Chiropractic*, 475 Mich at 371 n 14. Ripeness focuses on the timing of an action, requiring an assessment of a pending claim to discern whether an actual or imminent injury is in fact present. *Id.* at 378-379. OCRC relies on zoning cases that stand for the proposition that a property owner must obtain a final decision from the relevant municipality regarding the application of a zoning ordinance or regulation to the property owner's land before it is possible to tell whether the land retained any reasonable beneficial use or whether existing expectation interests have been destroyed. *Braun v Ann Arbor Charter Twp*, 262 Mich App 154, 158; 683 NW2d 755 (2004), citing *MacDonald, Sommer & Frates v Yolo Co*, 477 US 340, 349; 106 S Ct 2561; 91 L Ed 2d 285 (1986). We find that the zoning cases have no application for determining ripeness in the context of this case where plaintiff's suit was premised on an alleged physical invasion of the property (water) set in motion by the road project and not merely the application of a zoning ordinance or regulation to property. It is inherently logical to require a final determination from a municipality that has enacted a zoning ordinance or regulation before an affected property owner can sue the municipality for a property deprivation, given that the property owner may still be able to reasonably use or develop the land through alternative zoning mechanisms that the municipality ultimately could allow the property owner to employ. See *Oceco Land Co v Dep't of Natural Resources*, 216 Mich App 310, 314; 548 NW2d 702 (1996) ("A taking claim ripens when the landowner has received a final decision *regarding the application of a regulation* to his property") (emphasis added). But when there is an alleged physical invasion of property resulting from the government's action, a lawsuit is ripe for judicial review. See *Lingle v Chevron USA, Inc*, 544 US 528, 537; 125 S Ct 2074; 161 L Ed 2d 876 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property); *Peterman v Dep't of Natural Resources*, 446 Mich 177, 189 n 16; 521 NW2d 499 (1994) (when real property is actually invaded by induced water, earth, sand, or other material, a taking occurs within the meaning of the constitutions); *Ashley v Port Huron*, 35 Mich 296 (1877) ("A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other"); *Ligon v Detroit*, 276 Mich App 120, 132; 739 NW2d 900 (2007) (when a government taking results from an actual physical invasion of property, a taking occurs). We agree with plaintiff that OCRC's argument goes to the issue of determining the diminution of fair market value for purposes of assessing damages, not to whether the suit was ripe. The substance of OCRC's ripeness argument is renewed in connection with its argument that the damages awarded by the jury were excessive and speculative, which argument we reject later in this opinion.

(b) INSTRUCTIONS AND EVIDENCE ON ELEMENTS OF INVERSE CONDEMNATION

In three separately-framed arguments, OCRC contends that the trial court erred with respect to the instructions given to the jury on the liability aspect of the inverse condemnation claim, that plaintiff failed to provide evidence on the elements necessary to establish inverse condemnation, and that the OCRC could not be held liable for the acts of its contractors. Because these arguments dovetail into the single issue of what exactly must be proven to

establish a claim of inverse condemnation, we have consolidated the three arguments for purposes of our analysis.[3] The trial court instructed the jury, in relevant part, as follows:

> Plaintiff['s] claim[] in this matter is called an inverse condemnation claim. An inverse condemnation claim is instituted by a private property owner whose property[,] while not formally taken by eminent domain proceedings for a public use[,] has been damaged by a public improvement undertaking or other public activity.
>
> In order to establish its claim of inverse condemnation Plaintiff must prove that [OCRC] set into motion the destructive forces that caused damage to the Plaintiff's property.
>
> The government cannot avoid liability for inverse condemnation by authorizing work to be done by a third party whether the third party is an agent of the government or an independent contractor.

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[3] In regard to claims of instructional error, they are generally reviewed de novo on appeal and must be reviewed de novo when the claims concern questions of law or pure legal issues. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008); *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). Jury instructions must include all of the elements of a cause of action and should not omit material issues, defenses, or theories of the parties when supported by the evidence. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Id.* Reversal on the basis of instructional error is only required if the failure to reverse would be inconsistent with substantial justice. *Id.*, citing MCR 2.613(A).

Regarding the claimed evidentiary failures, they were preserved below and encompassed within OCRC's motion for directed verdict. We review de novo a trial court's ruling on a motion for directed verdict or JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). With respect to such motions, the evidence and all legitimate inferences are examined in a light most favorable to the nonmoving party. *Id.* "A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law." *Id.* If reasonable jurors could have honestly reached different conclusions, we cannot interfere with the jury's verdict, which must be allowed to stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). "Further, this Court recognizes the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

> I have just listed for you the proposition on which the Plaintiff has the burden of proof. For the Plaintiff to satisfy this burden, the evidence must persuade you that the proposition is true. You must consider all of the evidence regardless of which party produced it.
>
> If you decide that the Plaintiff has satisfied its burden of proof regarding its claim on inverse condemnation, you must decide the just compensation to be awarded to Plaintiff.

At this juncture, the trial court launched into instructions addressing just compensation, fair market value, and related damage principles.

OCRC maintains that the trial court erred by failing to instruct the jury that plaintiff was required to prove that OCRC abused its legitimate governmental powers in affirmative actions directly aimed at the property, which actions were a substantial cause of the decline of the property's value. In conjunction with this argument, OCRC argues that plaintiff failed to submit evidence establishing these elements that should have been recited in the jury instructions. According to OCRC, its actions were directed at improving Pontiac Trail Drive, which it had a statutory duty to maintain in reasonable repair, and that the culvert itself was not even designed to direct water *to* plaintiff's property. Moreover, the road project plans certainly did not include blocking the culvert. Indeed, the plans required the contractors to remove sediment collected in culverts. We note that if the instructional arguments fail, the evidentiary arguments paralleling the instructional arguments also fail, as they both relate to the elements of inverse condemnation.

In *Blue Harvest, Inc v Dep't of Transportation*, 288 Mich App 267, 277; 792 NW2d 798 (2010), this Court recently explored a claim of inverse condemnation:

> "An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989)(citation and quotation marks omitted). "While there is no exact formula to establish a de facto taking, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property." *Dorman v Clinton Twp*, 269 Mich App 638, 645; 714 NW2d 350 (2006)(citation and quotation marks omitted). Generally, a plaintiff alleging a de facto taking or inverse condemnation must establish (1) that the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004). "Further, a plaintiff alleging inverse condemnation must prove a casual connection between the government's action and the alleged damages." *Id.*

The property owner "must establish that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009). "Where . . . property has been damaged rather than completely taken by governmental actions, the owner

may be able to recover by way of inverse condemnation." *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004); see also *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 334 n 3; 572 NW2d 201 (1998) (an injury to an individual's property that deprives the owner of the ordinary use of the property is the equivalent of a taking, entitling the landowner to compensation); *Goldberg v Detroit*, 121 Mich App 153, 158; 328 NW2d 602 (1983).

The trial court failed to instruct the jury consistent with the above-cited caselaw, except with respect to the need to show an affirmative act, which was necessarily part of the instruction that plaintiff had to prove that OCRC *set into motion* destructive forces (hereafter "destructive-forces instruction").[4] However, reversal is not warranted in light of the law of the case doctrine and our Supreme Court's opinion in *Peterman*. With respect to the law of the case doctrine, in its appellee brief in the first appeal, OCRC argued that plaintiff could not satisfy the elements of an inverse condemnation claim, essentially raising the same issues presented here. This Court held:

> To establish a de facto taking claim, plaintiff is also required to show causation. This *may* be established by showing that defendant abused its legitimate powers through affirmative actions directly aimed at plaintiff's property.
>
> In *Peterman*, the Court held that the government's action in constructing a boat launch and installing jetties, which resulted in the diminishment of the plaintiffs' fast land, was sufficient to establish a taking. Although the government did not directly invade the plaintiffs' land, it set into motion the destructive forces that caused the erosion and eventual destruction of the plaintiffs' property. The Court rejected the government's argument that it need not compensate the plaintiffs because its actions were within its legitimate power to improve navigation of the state's waterways. The Court concluded that "simply because the state is acting to improve navigation does not grant it the power to condemn all property without compensation."
>
> We believe that *Peterman* controls the disposition of this case. As in *Peterman*, plaintiff presented evidence that [OCRC] set in [motion] destructive forces that caused flooding to plaintiff's land. Contrary to what [OCRC] argues, this case does not involve a situation where damage resulted because of an alleged omission by the government. Rather, the basis for plaintiff's taking claim is that [OCRC] engaged in affirmative acts in the exercise of its road construction activities that, while not directly invading plaintiff's land, set into motion the

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[4] To the extent that OCRC continues to assert that plaintiff's case involved omissions and not affirmative acts, we disagree, as did the prior panel. Even though there may have been a failure to dislodge debris from the culvert, said inaction fell under the umbrella of the larger affirmative act of engaging in and performing activities under the road project.

> destructive forces that caused the flooding to plaintiff's property. [*Estate Dev Co*, slip op at 4 (citations omitted; emphasis added).]

As reflected in this passage, the panel indicated that a claim of inverse condemnation may be established by showing that a governmental entity abused its legitimate powers through affirmative actions directly aimed at the plaintiff's property. But the panel phrased the proposition in such a manner that did not make it a mandatory part of the proofs. Instead, it merely indicated that a plaintiff "may" establish a claim of inverse condemnation through such proofs. Furthermore, the panel moved directly into a discussion of *Peterman*. This Court's prior opinion rejected OCRC's arguments that are posed anew in the present appeal, i.e., that plaintiff had to prove (with consistent jury instructions thereon) that OCRC abused its legitimate governmental powers in affirmative actions directly aimed at plaintiff's property. There was no significant change evidence-wise between the documentary evidence presented at summary disposition and that introduced at trial with respect to whether OCRC abused its legitimate governmental powers in affirmative actions directly aimed at plaintiff's property. Regardless of the legal soundness of the panel's earlier ruling, the ruling constitutes law of the case. *Freeman*, 212 Mich App at 38; *Bennett*, 197 Mich App at 500.

When the prior panel announced that *Peterman* was controlling and extensively applied *Peterman* in addressing the appellate issues, the principles from *Peterman* became the law of the case for purposes of remand and further proceedings, even if *Peterman* could be interpreted as being at odds with some of the other caselaw on inverse condemnation. It would be expected that the trial court follow *Peterman*. See *Lopatin*, 462 Mich at 260 ("[lower] tribunal may not take action on remand that is inconsistent with the judgment of the appellate court"). Requiring proof that OCRC set into motion destructive forces that eventually caused damage to plaintiff's property does not appear to entail a need to show a *substantial* causal link, a need to show *abuse* of legitimate governmental powers, or a need to show affirmative actions *directly aimed* at the property. We disagree with OCRC's assessment that the destructive-forces language only encapsulates the element of causation; rather, it also includes the need to show that the government committed a particular affirmative act that set forces into motion, even though the act need not be directly aimed at the property at issue, nor constitute an abuse of legitimate governmental powers. It would patently offend the law of the case doctrine for us to reverse the trial court on the premise that it should have followed caselaw other than *Peterman* when the prior panel ruled that *Peterman* controlled; the whole purpose of the doctrine is to maintain consistency within a suit.

Even absent application of the law of the case doctrine, *Peterman* is binding Supreme Court precedent. We shall briefly examine *Peterman*, wherein our Supreme Court ruled:

> At issue is the erosion of plaintiffs' beachfront property because of the construction of a boat launch and jetties that altered the littoral drift of the current thereby depriving plaintiffs' property of the sand that had previously nourished and replenished it. Defendant contends that because it never actually invaded plaintiffs' property, its destruction is not embraced within the Taking Clause. In other words, defendant contends that its actions did not unconstitutionally take plaintiffs' property because the erosion of the beachfront was an *indirect consequence* of defendant's actions. . . . [T]his Court is reluctant to relieve the

government of its duty to compensate a property owner unless the destruction of property is "too remote, trivial or uncertain" to deprive a claim of merit.

* * *

Taking has been found, therefore, when the state has eliminated access to property, or made the usual access to plaintiffs' land very difficult. Similarly, damage to property caused by a nearby nuisance maintained by the state is compensable, as are damages arising from the removal of "lateral support of adjacent grounds to the injury of their owners." In fact, inverse condemnation may occur even without a physical taking of property, where the effect of a governmental regulation is "to prevent the use of much of plaintiffs' property . . . for any profitable purpose."

In short,

"'[a]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation.'"

In the instant case, the trial court found that defendant's actions were the proximate cause of the destruction of plaintiffs' beachfront property. *Assuming that defendant did not directly invade plaintiffs' land, it undoubtedly set into motion the destructive forces that caused the erosion and eventual destruction of the property*. Defendant was forewarned that the construction of the jetties could very well result in the washing away of plaintiffs' property, and the evidence reveals that the destruction of plaintiffs' property was the natural and direct result of the defendant's construction of the boat launch. The effect of defendant's actions were no less destructive than bulldozing the property into the bay. . . . Defendant, therefore, may not hide behind the shield of causation in the instant case. [*Peterman*, 446 Mich at 188-191 (citations omitted; emphasis added).]

As indicated earlier in our opinion, the *Peterman* Court noted that when real property is actually invaded by induced water, earth, sand, or other material, a taking occurs within the meaning of the constitutions. *Id.* at 189 n 16. The *Peterman* Court clearly indicated that an inverse condemnation action could be sustained where damages were an indirect consequence of the government's actions and absent a direct invasion of property. The construction of the boat launch and jetties did not constitute an action directly aimed at the plaintiffs' property, nor did the Court rely on a finding that the DNR *abused* its legitimate governmental powers, yet the inverse condemnation claim was held to be legally sound. Ultimately, the key question in *Peterman* was whether the government set into motion destructive forces that caused damage to property and that framing of the issue is consistent with the instructions given by the trial court in the case at bar.

OCRC next complains of error in the court's instruction that characterized an inverse condemnation claim as one "instituted by a private property owner whose property while not formally taken by eminent domain proceedings for a public use has been damaged by a public improvement undertaking or other public activity." Contrary to OCRC's argument, this instruction is consistent with the caselaw. See *Spiek*, 456 Mich at 334 n 3; *Merkur Steel*, 261 Mich App at 129; *Goldberg*, 121 Mich App at 158.

Next, OCRC argues that the trial court should have instructed the jury that OCRC could defend itself by showing that the contractors had negligently performed the work that resulted in the blocked culvert. In that same vein, OCRC additionally maintains that the court should not have instructed the jury that OCRC was unable to avoid liability for inverse condemnation simply because it authorized the work to be done by third parties, whether an agent or an independent contractor. OCRC argues that the instructions effectively made it "strictly liable for any and all acts by independent contractors whether those acts are properly part of a governmental project or they are negligent acts neither called for nor contemplated in the plans for the project." OCRC contends that this case was, at most, a negligence case and not one of inverse condemnation. And OCRC is immune from liability for negligence claims relating to the performance of a governmental function, MCL 691.1407(1). OCRC argues that plaintiff is attempting to circumvent governmental immunity for tort claims by reclassifying its tort claim as an inverse condemnation claim. OCRC contends that because the various contractors actually performed the work that may have led to the clogging of the culvert, without OCRC's direction to block the culvert, OCRC was insulated from liability, entitling it to a directed verdict.

OCRC fails to cite any relevant caselaw supporting the general proposition that a governmental entity cannot be held liable *with respect to the law of inverse condemnation* where activities causing a taking are performed by agents and contractors.[5] In general, T-M and the subcontractors were performing work on behalf and under the authority of OCRC and they were acting within the scope of their authority. See *Sherlock v Mobile Co*, 241 Ala 247, 249; 2 So2d 405 (1941) (the county "cannot avoid liability to property owners for property taken or for injury done . . . by authorizing the work to be done by a third person acting by the county's authority, whether such third person be an agent or an independent contractor"). OCRC grounds its argument on the distinction that the specific acts that allegedly caused the flooding and wetlands expansion were not authorized by OCRC or envisioned as being part of the process in carrying out the engineering plans, but instead constituted negligence on the part of the contractors. And it is the negligence aspect that shields OCRC from a claim of inverse condemnation. OCRC implicitly appears to accept that if a project is completed by contractors pursuant to plans and specifications and absent any negligence, a governmental entity could be held liable for inverse

[5] Importantly, we are not yet looking at this issue in the context of a tort or negligent act being committed by a contractor that results in a taking. Rather, we are initially examining the issue in general terms of whether a governmental entity can escape an inverse condemnation claim because the activity at issue was performed by an agent or contractor.

condemnation if the project as designed caused a physical invasion of property, even though contractors performed the work.

In the context of tort law, a governmental agency is potentially liable only if the case against it falls into one of the enumerated statutory exceptions to governmental immunity. *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). Thus, merely because an employee or agent of a governmental entity was negligent, it does not mean that the entity itself is subject to liability, unless one of the exceptions applies. MCL 691.1407(1) states that, "[e]xcept as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." There can be no reasonable dispute that OCRC was engaged in the exercise and discharge of a governmental function with respect to performing the road project. See MCL 224.21(2) ("A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel").

In the first appeal, OCRC argued that they were insulated from liability because it did not perform the construction activities that allegedly resulted in the damages. The argument was implicitly yet clearly rejected by this Court, given that it examined evidence of trees, brush, vegetation, and debris blocking the culvert and considered that evidence in finding an issue of fact on causation. *And this evidence pertained to construction activities performed by the contractors*. While OCRC did not expressly frame its appellate arguments in the prior appeal in terms of contractor "negligence," its focus on the activities of the contractors as a basis to affirm the summary dismissal order necessarily encompassed all activities, negligent or otherwise. Accordingly, the law of the case doctrine precludes consideration of OCRC's contractor-tort arguments.

It is true that part of plaintiff's suit, regardless of the constitutional labels used by plaintiff, sounded in tort law, where plaintiff alleged negligent performance by the contractors in executing the road project. However, another aspect of this case that evolved with respect to erosion materials blocking the culvert was that there were some arguments and evidence that the removal of trees and bushes that would typically halt erosion, the change in the slope of the roadway embankment that made the slope steeper and the embankment more susceptible to erosion, the lack of any or adequate erosion controls, and the installation of an inadequately-sized culvert, all of which were encompassed within the road project's plans and designs, played a role in causing erosion sediment, soils, and materials to block the culvert. OCRC fails to address this component of plaintiff's case in relation to its contractor-tort argument. Indeed, the foreign caselaw cited by OCRC supports a claim of inverse condemnation based on a project's design that causes a physical invasion of property. See, e.g., *Bd of Comm'rs of the Little Rock Municipal Water Works v Sterling*, 268 Ark 998, 1001-1002; 597 SW2d 850 (Ark App, 1980). We note that the no-cause verdict in favor of the subcontractors suggests that the jurors did not find any active contractor negligence. We further note that OCRC does not appear to claim that its own negligence could not be relied upon by the jury in rendering its verdict, and there was evidence that OCRC was contacted about debris blocking the culvert and failed to timely clear the blockage.

Furthermore, regardless of whether plaintiff's case was premised in whole or in part on tort principles, *Peterman* can be read as permitting a negligence-based inverse condemnation claim, where its "setting into motion" language is very broad and not necessarily restricted to *intentional* governmental action, i.e., the government could negligently set into motion destructive forces. This conclusion is supported by the *Peterman* Court's statement that "because defendant's *unscientific construction* of the boat launch unnecessarily caused the destruction of plaintiffs' beach, compensation must be awarded for the loss of the beach." *Peterman*, 446 Mich at 208 (emphasis added).

In sum, we reject OCRC's contractor-tort arguments, and the trial court did not err in denying OCRC's motion for directed verdict, nor did it err in connection with the jury instructions.[6]

Finally, OCRC asserts that the evidence revealed that the wetlands expansion occurred well in advance of the road project; therefore, plaintiff failed to establish that the road project set into motion destructive forces that caused the expansion. We disagree. There was sufficient trial evidence and inferences arising from the evidence, when viewed in a light most favorable to plaintiff, to allow the causation issue to go to the jury, which is consistent with the ruling by the prior panel that relied on documentary evidence comparable to the evidence that was eventually presented at trial.

(c) ATTORNEY MISCONDUCT

OCRC claims that plaintiff's counsel committed misconduct when he made the following remarks during closing arguments on rebuttal:

> Abraham Lincoln, great American, also a lawyer, wanted to ask his political opponent during a debate do you still beat your wife. Do you still beat your wife. Natural inclination is to answer no, but even that answer leaves the suspicion that at one time you did beat your wife. And that's a lawyer for you, they know tricks and they spend their careers devising schemes to do the best possible thing they can for their client in a court of law.
>
> Mr. Potter [OCRC's attorney] even shared with you one of the tricks he uses. . . . Well, wasn't that your strategy, Mr. Potter. That's a lawyer trick.[7]

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[6] OCRC also presents an argument built around the common-work-area doctrine. We find, however, that the common-work-area doctrine has no relevancy to the case at bar, as we are not concerned with dangers at work sites that create a risk of injury to workers. *Latham v Barton Malow Co*, 480 Mich 105, 111-113; 746 NW2d 868 (2008).

This is the sole instance of alleged misconduct. Given the brevity of the comments and the fairly innocuous nature of the remarks, when examined in context and in light of the lengthy trial, the comments did not affect OCRC's substantial rights and they were harmless, assuming that they were improper in the first place. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982); *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 682-683; 630 NW2d 356 (2001). Moreover, OCRC failed to preserve the issue with an objection or motion for mistrial, and it cannot reasonably be concluded that the remarks resulted or played too large of a part in the jury's verdict, nor can it be found that the remarks denied OCRC a fair trial. *Reetz*, 416 Mich at 102-103.

(d) REMITTITUR

OCRC argues in cursory fashion that it is entitled to remittitur or a new trial because the damages were excessive and speculative. OCRC claims that the damages awarded to plaintiff, which were based on the decrease in the value of the property due to the property being undevelopable, were inherently speculative because the claim was not ripe. Further, the Takings Clause does not guarantee property owners an economic profit from use of their land, and plaintiff's past history of development around Mirror Lake demonstrated that claimed lost profits were purely speculative. According to OCRC, plaintiff only provided projections and the projections were contingent on unknown and uncertain factors.

We initially find that OCRC, within the framework of the argument itself, fails to provide any citation to the record regarding the testimony on damages, fails to discuss any of the particular testimony on damages or just compensation, and it simply makes broad, sweeping complaints about the damage award absent elaboration and without tying them to the record and testimony. As our Supreme Court stated in *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998):

> "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow." [Citation omitted.]

Additionally, the issue was not adequately preserved for appeal because OCRC never properly moved for a new trial premised on remititur. *Pena v Ingham Co Rd Comm*, 255 Mich

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[7] Here, the "trick" supposedly used by OCRC's attorney is that when he deposes an expert witness and obtains a favorable statement, counsel does not ask for an explanation concerning the statement, and then, when the expert testifies at trial, counsel elicits the favorable statement and when the expert attempts to explain the statement, counsel remarks that the expert never gave that explanation at the deposition. OCRC omits this part of the closing rebuttal argument made by plaintiff's counsel.

App 299, 315-316; 660 NW2d 351 (2003) ("Although defendant forcefully argues the excessiveness of the verdict, it never moved in the trial court for a remittitur or a new trial on this ground[,]" and "[c]onsequently, defendant has failed to preserve this argument for appellate review"). We are fully aware of the procedural aspects of this case which transpired after entry of the judgments, including OCRC's motion for remand filed with this Court. However, it was OCRC's failure to identify a remititur issue in the remand motion that resulted in denial of the motion. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished order of the Court of Appeals, entered June 25, 2009 (Docket Nos. 291989 and 292159).

Furthermore, OCRC's arguments do not warrant reversal on the issue of damages. With respect to the argument framed in terms of ripeness, the testimony by Janet Green, city clerk for Orchard Lake, and by Frank Bonzetti, one of plaintiff's owners, established that the development was indeed going to be permitted by Orchard Lake, but for the expansion of the wetland lines. And it was that very expansion that formed the basis of plaintiff's lawsuit. It is nonsensical for OCRC to complain that plaintiff did not obtain final approval of the development when it was OCRC's own conduct that deprived plaintiff of receiving that approval. Further, while plaintiff may not have obtained a formal rejection from the city to proceed with the development, Green's testimony clearly established that the project was dead because of the change in the wetland lines.[8] Our analysis also provides further support for the conclusion that plaintiff's suit was ripe.

In regard to the alleged excessive and speculative damage award, the testimony by Bronzetti, along with that of a real estate expert, provided evidence of the planned development, the costs associated with such a development, the revenues that likely would have been generated by the development in light of other developments, and the diminution in value of the property. The testimony supported the dollar amount reached by the jury. The damage award was not the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake, and the award was within the limits of what reasonable minds would deem just compensation for the damage sustained. *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009). The damage award was supported by objective factors and was firmly grounded in the record; to rule otherwise would usurp the jury's authority to determine the amount of damages. *Id.* Moreover, the jury was permitted to consider the most profitable and advantageous use of the land, even if the use was still in the planning stages and had not yet been executed. *Merkur Steel*, 261 Mich App at 134-136. This principle was included in a jury instruction here, and OCRC does not challenge that instruction. The damages were not excessive, nor unduly speculative. Reversal is unwarranted.

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[8] OCRC argues that the wetland boundaries may have changed between 1984 and prior to commencement of the road project; therefore, reliance on the new survey in relationship to proving damages made the damage request and award speculative. However, this was an issue properly left for the jury to contemplate and not for us resolve as a matter of law.

(e) JNOV

In Docket No. 292159, T-M argues that OCRC was entitled to a JNOV on the inverse condemnation claim for reasons already addressed and rejected above.

2. PLAINTIFF'S APPEAL REGARDING DENIAL OF CASE EVALUATION SANCTIONS

Plaintiff appeals the trial court's denial of its motion seeking case evaluation sanctions against OCRC. This issue is complicated by the procedural history of the case relative to the dates associated with case evaluation, the timing of the order granting OCRC's motion for summary disposition, and the subsequent reversal of that ruling by this Court on appeal. This Court reviews de novo a trial court's decision whether to grant case evaluation sanctions under MCR 2.403(O). *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003). The legal principles governing the construction and application of statutes apply equally to the interpretation of court rules. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). Accordingly, we begin with examining the plain language of the court rule, and if it is unambiguous, "we must enforce the meaning expressed, without further judicial construction or interpretation." *Id.*

Plaintiff argues that case evaluation sanctions should have been awarded pursuant to MCR 2.403(O)(1), where OCRC rejected the $75,000 case evaluation recommendation, and where the verdict of $1,747,000 was more favorable to plaintiff than the case evaluation. MCR 2.403(O)(1) provides:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

Plaintiff and OCRC both rejected the case evaluation by operation of MCR 2.403(L)(1) when they failed to file a written acceptance or rejection. A "verdict" includes the jury verdict entered against OCRC. MCR 2.403(O)(2)(a). A verdict is "considered more favorable to a defendant if it is more than 10 percent below the evaluation, and is considered more favorable to the plaintiff if it is more than 10 percent above the evaluation." MCR 2.403(O)(3). The verdict here was more than ten percent above the case evaluation. Under the plain language of the court rule, plaintiff was entitled to actual costs, which include a reasonable attorney fee for services necessitated by the rejection of case evaluation. MCR 2.403(O)(6)(b). The question that we must answer is whether entry of the order granting OCRC's motion for summary disposition during the 28-day, case-evaluation response period (hereafter "response period") excused OCRC from further participation in the case evaluation process and from having to make an acceptance-rejection decision before the response period expired, such that OCRC cannot be sanctioned after the inverse condemnation claim was reinstated and plaintiff obtained a more favorable verdict than the case evaluation.

We find that because plaintiff had a right to move for reconsideration, MCR 2.119(F), and to file an appeal, MCR 7.205, there always remained a possibility that plaintiff's case might

be reinstated, and thus OCRC remained a party who was obliged to participate in case evaluation until all postjudgment measures had been exhausted.

Under MCR 2.403(O)(1), the liability for costs can potentially arise only where "a party has rejected an evaluation and the *action proceeds to verdict*[.]" (Emphasis added.) Further, under MCR 2.403(O)(2)(c), a "verdict" includes "a judgment entered as a result of a ruling on a motion *after rejection of the case evaluation*." (Emphasis added.) These two provisions support the proposition that, for purposes of chronology, you must first have a rejection of case evaluation *followed by* the entry of an unfavorable verdict before the rejecting party on the losing end of the verdict becomes liable for sanctions. Therefore, in our case, when the trial court entered the order granting OCRC's motion for summary disposition *prior to OCRS's rejection* of case evaluation, and there is no dispute that a summary disposition order is a verdict, it would first appear that OCRC had safe haven from any sanctions, such that it should be excused from further participation in the case evaluation process before the response period lapsed. However, even though OCRC was temporarily protected from sanctions, a broader view of the litigation and the workings of reconsideration and appellate rules would have put OCRC on notice that the summary disposition order was subject to reversal on reconsideration or appeal, with a possibility of an unfavorable verdict looming on the horizon. Because of this procedural reality, the balance of the response period remained relevant and the case evaluation was not rendered moot, despite the order granting summary disposition in favor of OCRC. There is no language in MCR 2.403(O) supporting OCRC's position. Support for our conclusion is found in *Peterson v Fertel*, 283 Mich App 232; 770 NW2d 47 (2009).[9]

Here is an outline of the events as they transpired in *Peterson, id.* at 234:

1. April 16, 2007 – The case evaluation took place and the panel recommended an award in favor of the plaintiff and against two defendant doctors.

2. May 1, 2007 – The trial court granted summary disposition in favor of the doctors on motions filed after the case evaluation recommendation was revealed.

3. May 11, 2007 – The plaintiff filed a motion for reconsideration of the summary disposition order.

4. May 15, 2007 – The plaintiff rejected case evaluation by operation of MCR 2.403(L)(1) when she failed to accept or reject during the 28-day response period.

5. May 15, 2007 (or earlier) – One doctor accepted and one doctor rejected the case evaluation.

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[9] Plaintiff did not cite *Peterson* in the original motion for case evaluation sanctions on April 1, 2009. This is because the *Peterson* opinion was not issued until April 9, 2009. *Peterson* was cited in plaintiff's motion for reconsideration of the trial court's order denying case evaluation sanctions.

6. June 19, 2007 – The trial court denied the plaintiff's motion for reconsideration and later awarded case evaluation sanctions to the doctors.

The plaintiff appealed the award of sanctions, arguing that the trial court erred "because the trial court granted summary disposition . . . *before* plaintiff rejected the case evaluation." *Id.* at 236-237 (emphasis in original). The plaintiff maintained "that the trial court made its dispositive ruling before the rejection and that this rendered the case evaluation irrelevant because [the doctors] were already dismissed from the case." *Id.* at 237. This Court, in affirming the sanctions, held that the order denying the plaintiff's motion for reconsideration qualified as a "verdict" under MCR 2.403(O)(2)(c) and that this provision "does not limit its definition of 'verdict' to orders following motions for summary disposition." *Id.* According to the *Peterson* panel, the order denying reconsideration "indisputably constitutes a ruling on a motion *after* plaintiff rejected the case evaluation." *Id.* Stated otherwise, the *Peterson* panel ruled that simply because a summary disposition order had been entered, it did not mean that the balance of the case evaluation response period was rendered moot, as a subsequent order of the court could also fit the definition of a "verdict" and arise *after* a rejection. The jury verdict here, entered after the summary disposition order was entered and pursuant to plaintiff's right to seek reconsideration and an appeal, arose *after* OCRC rejected the case evaluation.

As indicated in *Peterson, id.* at 237-238:

> [U]nlike cases holding that certain orders do not constitute verdicts, this case does not involve an alternative resolution, like settlement or arbitration, that would indicate a mutual decision to avoid further litigation and trial. Plaintiff characterizes the case evaluation as "totally irrelevant" after the grant of summary disposition, but this ignores the plain objective of a motion for reconsideration in this context, which is to call attention to the trial court's alleged error in granting the motion for summary disposition, to urge the reversal of that decision, to keep the action alive against the defendants and, at its essence, to continue the litigation toward trial.

Here, plaintiff had 21 days from entry of the summary disposition order in which to file its motion for reconsideration, MCR 2.119(F)(1), "in order to keep the action alive," and during a portion of that time period the clock continued to tick with respect to accepting or rejecting the case evaluation. The fact that plaintiff filed its motion for reconsideration on the last day of the response period is irrelevant, as there remained additional time to file the motion under MCR 2.119(F)(1), which should have kept OCRC's guard up. Even after the denial of the motion for reconsideration, plaintiff filed the appeal, MCR 7.205, "in order to keep the action alive."[10]

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[10] This Court has determined that "it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the mediation evaluation to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)." *Keiser v Allstate Ins Co*, 195 Mich. App. 369, 374-375; 491 N.W.2d 581 (1992); see also *McManamon v Redford Charter Twp*, 273 Mich App 131; 730 NW2d 757 (2006).

Plaintiff succeeded and eventually obtained a verdict more favorable to it than the case evaluation rejected by OCRC. Had plaintiff succeeded on the motion for reconsideration followed by the favorable jury verdict, absent this Court's involvement in the suit, it certainly would have been entitled to case evaluation sanctions. Accordingly, case evaluation was not rendered moot after entry of the summary disposition order, and OCRC's rejection of case evaluation subjected it to the possibility of sanctions should plaintiff ultimately succeed during the remaining course of the litigation. It must be noted that had this Court affirmed the order granting OCRC's motion for summary disposition, the order denying plaintiff's motion for reconsideration would have constituted a "verdict" entered *after* plaintiff's rejection of case evaluation under the *Peterson* analysis, thereby entitling OCRC to sanctions. The balance of the response period was not moot as to *any* party.[11]

T-M and OCRC argue that awarding case evaluation sanctions to plaintiff goes against the purpose of sanctions, which is to place the burden of litigation costs onto the party that rejected the case evaluation recommendation in order to move toward and force a trial, and OCRC did not reject in an effort to take the case to trial as the case had already been dismissed, but plaintiff was attempting to force a trial. This argument is inconsistent with *Peterson* and the language of MCR 2.403(O), which does not preclude a party from receiving case evaluation sanctions just because it rejected the case evaluation and proceeded to trial. Ultimately, under MCR 2.403(O), it does not matter why OCRC rejected the case evaluation. In fact, MCR 2.403(O)(1) allows case evaluation sanctions to be awarded to a party even where the party rejected the recommended award if the subsequent verdict is more favorable to that rejecting party than the case evaluation, unless the exception in MCR 2.403(O)(11) applies. MCR 2.403(O)(11), the "interest of justice" exception, does not apply here because it is only implicated when "the 'verdict' is the result of a motion," not a jury trial. OCRC's argument that sanctions should not be awarded because of the unusual sequence of events in this case lacks merit because the caselaw cited in support of the proposition dealt with the "interest of justice" exception, which is not implicated.

In sum, the trial court erred in denying plaintiff's request for case evaluation sanctions. We remand for further proceedings relative to the calculation of the proper amount of sanctions.

B. DOCKET NO. 292159

1. T-M'S APPEAL OF THE DIRECTED VERDICT ON INDEMNIFICATION

The issue of indemnification is controlled by MDOT's specifications, and in particular section 107.10A, which was incorporated into the OCRC/T-M contract and which provided:

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[11] T-M's reliance on *Salter v Patton*, 261 Mich App 559; 682 NW2d 537 (2004), for the proposition that following a dismissal a defendant is no longer a party to the case is wholly lacking in merit, as the defendants in *Salter* were dismissed because of a settlement agreement, which would not permit a party thereafter "to keep the action alive," and not an order granting summary disposition. Other cases cited by T-M are also irrelevant and distinguishable.

> The Contractor [T-M] shall save harmless, indemnify and defend in litigation the State, the Commission, the Department and its agents[12] and employees, against all claims for damages to public or private property and for injuries to persons arising out of and during the progress and to completion of work.

In *Badiee v Brighton Area Schools*, 265 Mich App 343, 351-352; 695 NW2d 521 (2005), this Court set forth the following governing principles with regard to contractual indemnification:

> This Court construes indemnity contracts in the same manner it construes contracts generally. "An unambiguous contract must be enforced according to its terms." If indemnity contracts are ambiguous, the trier of fact must determine the intent of the parties. "While it is true that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee, it is also true that indemnity contracts should be construed to give effect to the intentions of the parties." [Citations omitted.]

T-M argues that the trial court erred in directing a verdict in favor of OCRC because the indemnification provision does not expressly or implicitly apply to inverse condemnation claims. According to T-M, the indemnification provision only covers tort-type damages, which are distinct from constitutional awards for governmental takings. This argument lacks merit. An inverse condemnation claim can be based on a physical invasion of property caused by the government, giving rise to a claim for damages in order to make the property owner whole. *Spiek*, 456 Mich at 334 n 3; *Merkur Steel*, 261 Mich App at 134-136; *Goldberg*, 121 Mich App at 158. The indemnification agreement covered "all" claims for damages to private property arising out of and during the progress of the road project. Contrary to T-M's arguments, the language in the indemnification agreement is plain and unambiguous, and it necessarily encompasses the inverse condemnation claim filed by plaintiff. Because the indemnification provision is not ambiguous, there was no need for the jury to address and resolve the parties' intent and sending the issue to the jury would have been error. And this analysis and conclusion is equally applicable to T-M's argument that the agreement's requirement to procure insurance for "property damage" did not entail insurance for inverse condemnation losses. The case involves property damage, pure and simple.

T-M contends that the indemnification provision is unenforceable and violates public policy pursuant to MCL 691.991, which provides:

> A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith,

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[12] This includes OCRC, and there is no dispute on that matter.

> purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

First, the indemnification agreement did not pertain to the construction or repair of a "building, structure, appurtenance and appliance." Further, under the statute, "an indemnitor is not liable for the indemnitee's negligence, unless the indemnitor is also negligent, regardless of contractual language to the contrary." *Sentry Ins Co v Nat'l Steel Corp*, 147 Mich App 214, 219; 382 NW2d 753 (1985). Here, OCRC's liability was premised, in part, on the negligent or wrongful actions of T-M, the indemnitor. Therefore, MCL 691.991 does not bar application of the indemnification agreement. We note that the statute refers to the "sole negligence of the promisee or indemnitee, [or] his *agents*." (Emphasis added.) T-M, Oakland, and Owen were all agents of OCRC, and these are the only parties, plus OCRC, whose negligence or wrongdoing was at issue. So, in a sense, the indemnification agreement is a covenant to indemnify OCRC for liability arising out of damage to property caused by or resulting from the sole negligence of OCRC and its agents (T-M, Oakland, and Owen). However, because T-M also stood in the shoes of the indemnitor and was accused of negligence or wrongful conduct, the indemnification agreement could be enforced without offending MCL 691.991.

Finally, T-M argues that the doctrine of acquiescence precludes OCRC from being indemnified by T-M. OCRC argues that the doctrine of acquiescence does not apply in this case because there is no contractual provision limiting T-M's obligation to indemnify OCRC. T-M, citing law from other jurisdictions, asserts that the doctrine of acquiescence is applied to prevent indemnitees from recovering full indemnity where they have acquiesced in the condition giving rise to the underlying liability. *Illinois Central Gulf R Co v Crown Zellerbach*, 859 F2d 386, 390 (CA 5, 1988). T-M argues that OCRC acquiesced in blocking the culvert when it failed to timely respond to repeated notifications of the blocked culvert. OCRC notes that *Illinois Central* also indicated that the doctrine should only be employed to the extent that it is consistent with the express language and obvious purpose of the indemnification agreement.

Assuming that this doctrine is applicable in Michigan and in non-railroad cases (T-M only cites railroad cases), the record does not support a conclusion that OCRC acquiesced to having a blocked culvert, and it certainly did not acquiesce to the flooding of plaintiff's property. Instead, it simply failed to timely respond to notice that the culvert was blocked, and OCRC did eventually unplug the culvert, as did Oakland on occasion. There was neglect, but not acquiescence. Also, the property had already been flooded and damaged to some extent at the time of notification. Further, applying the doctrine of acquiescence would be inconsistent with the express language of the indemnification agreement.

Viewing the indemnification agreement in a light most favorable to T-M, the agreement clearly applied in this case and thus the trial court did not err in directing a verdict in favor of OCRC. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003).

2. T-M'S APPEAL OF THE NO-CAUSE VERDICT (GREAT WEIGHT)

T-M argues that the evidence established that Owen and Oakland were solely responsible for clogging the culvert and failing to remove the debris from the culvert. T-M points to evidence that Owen acknowledged that it was responsible for tree and stump removal and clearing, and that Oakland acknowledged that it was responsible for earthwork, grading, and culvert replacement. Indeed, there was evidence that Oakland personnel discovered on occasion that the culvert was blocked and a crew unplugged it. T-M further maintains that there was no evidence presented at trial that OCRC or T-M were at fault for blocking the culvert. Therefore, T-M contends that the no-cause verdict was against the great weight of the evidence.

First, we agree with Owen and Oakland that T-M failed to preserve the issue for appeal. "[C]hallenges to verdicts on the ground that they are against the great weight of the evidence, must be raised in a motion for a new trial in order to preserve them for appeal." *Heshelman v Lombardi*, 183 Mich App 72, 83; 454 NW2d 603 (1990); see also MCR 2.611(A)(1)(e). The no-cause judgment at issue was a separate judgment from the $2.2 million judgment entered in favor of plaintiff and it had nothing to do with the order rejecting plaintiff's request for case evaluation sanctions. The $2.2 million judgment and order denying sanctions formed Docket No. 291989. Therefore, the filing of the claim of appeal in Docket No. 291989 by plaintiff on May 6, 2009, did not preclude T-M from attacking the no-cause judgment through a motion for new trial, as this Court did not yet have jurisdiction over the no-cause judgment. See MCR 7.208(A) (after claim of appeal, the trial court may not set aside or amend the judgment "appealed from"). It was T-M's *own action* in filing the claim of appeal in Docket No. 292159 on May 15, 2009, relative to the no-cause judgment that effectively divested the trial court of jurisdiction to hear and decide a motion for new trial premised on a great-weight argument. T-M should have first filed its motion for new trial, obtained a ruling, and then filed its claim of appeal as to the no-cause judgment. T-M argues that this Court's order on the remand motions, which provided that the parties "failed to demonstrate that there is an issue sought to be reviewed on appeal that should be decided initially by the trial court," was an expression by this Court that it was unnecessary to preserve the great-weight argument below before we addressed the issue. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished order of the Court of Appeals, entered June 25, 2009 (Docket Nos. 291989 and 292159). However, it was T-M's failure to adequately identify its great-weight argument in its motion to remand filed with this Court that accounted for the Court's wording of the order.

Furthermore, the issue is not adequately briefed. As to both subcontractors, the jury answered "no" to the verdict questions asking whether they had breached the subcontracts, whether they had been required to obtain liability insurance, whether they were required to contractually indemnify T-M, and whether they owed contribution to T-M. These questions correlated to the specific causes of action alleged in T-M's third-party complaint. While T-M argues that there was no evidence that it did anything to block the culvert and that the evidence showed that the subcontractors were to blame, T-M does not engage in any discussion whatsoever to connect the evidentiary matters to subcontracts, liability insurance, contractual indemnification, and contribution. Indeed, there is a complete absence of any discussion of contract, insurance, indemnification, and contribution law. T-M needed to discuss the evidentiary problems in relationship to, for example, the cause of action for breach of

subcontract – how does the fact that the subcontractors caused the culvert blockage equate to a breach of the subcontracts, what do the subcontracts even provide and require?

Moreover, T-M's argument substantively fails. In *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006), this Court, addressing a great-weight claim, stated:

> We review for an abuse of discretion a trial court's denial of a motion for new trial. When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, "even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" "'[E]very attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.'" [Citations omitted.]

Here, there is no basis to grant T-M a new trial on the theory that the verdict was against the great weight of the evidence. As indicated by Oakland and Owen, there was sufficient evidence from which the jury could have reasonably determined that OCRC and/or T-M were at fault for the culvert blockage and not the subcontractors. As discussed above, part of plaintiff's case was predicated on design and planning flaws and defects relative to the road project that made the culvert susceptible to being blocked by soils and sediments as caused by erosion. Owen and Oakland had nothing to do with the plans and designs; they merely carried out certain aspects of the project. Additionally, the jury could have solely faulted T-M and/or OCRC because of their oversight responsibilities and failure to timely unplug the blocked culvert after it was called to OCRC's attention. Finally, Owen correctly asserts that there was evidence that its work on the project near or around the culvert site was completed before the new culvert was put in and before any problems developed and that its work on the project had nothing to do with the blockage. In sum, T-M's great-weight argument fails on multiple levels.

C. DOCKET NO. 295968

T-M'S APPEAL OF ORDER AWARDING CASE EVALUATION SANCTIONS

T-M appeals the trial court's order awarding Oakland case evaluation sanctions. The case evaluation recommendation was for Oakland to pay T-M $45,000 on T-M's third-party complaint. Oakland accepted the evaluation before summary disposition was granted in favor of OCRC, with T-M formally rejecting the evaluation after entry of the summary disposition order. In simplest of terms, given the no-cause jury verdict, which was more favorable to Oakland than the case evaluation, along with T-M's *previous* rejection of the case evaluation, MCR 2.403(O)(1) and (4)(a) mandated the trial court to award sanctions to Oakland.

Many of T-M's arguments are comparable to those made by OCRC in relation to plaintiff's request for case evaluation sanctions. T-M contends that the case evaluation process became moot once the trial court entered the order granting OCRC's motion for summary

disposition. For all of the reasons discussed earlier in this opinion, these arguments necessarily fail. The case evaluation process did not become moot and the litigation was not at an end simply because summary disposition was granted, where plaintiff had the procedural opportunities to seek reconsideration and an appeal. In fact, T-M's arguments have even less merit than OCRC's arguments because the summary dismissal order pertained to plaintiff's suit against OCRC and not T-M's third-party action against Oakland, which remained pending. Although the trial court found the third-party claims to be moot after it granted OCRC's motion for summary disposition, that dismissal did not mean that T-M's third-party complaint against Oakland was dismissed, which complaint was based in part on breach of a subcontract as to the road project and the procurement of insurance. This fact was made quite evident and clear when this Court dismissed plaintiff's claim of appeal for lack of jurisdiction back in 2006 because the third-party claims had not been dismissed. *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished order of the Court of Appeals, entered July 17, 2006 (Docket No. 271438).

T-M argues that *CAM Constr v Lake Edgewood Condominium Ass'n*, 465 Mich 549; 640 NW2d 256 (2002), supports a conclusion that the summary dismissal of OCRC essentially ended the entire civil action and thus the case evaluation process terminated, as case evaluation is not a piecemeal process. Again, even if one accepted that summary dismissal of OCRC temporarily rendered irrelevant T-M's third-party complaint against Oakland, the summary dismissal itself did not render the case evaluation process meaningless because plaintiff had the right to seek reconsideration and an appeal. Further, reliance on *CAM Constr* is misplaced. The question there was "whether a party may appeal an adverse summary disposition judgment on one count of a multicount action after accepting a case evaluation rendered under MCR 2.403." *Id.* at 550. The Court held that under MCR 2.403(M)(1), which provides that a party's acceptance of a case evaluation disposes of all claims in the action, after acceptance of a case evaluation, "a party may not subsequently appeal an adverse summary disposition on one count in the action." *Id.* The *CAM* holding and analysis has absolutely no bearing on resolving the case evaluation issue in the instant case. We note that MCR 2.403(O)(4)(a) addresses "cases involving multiple parties" and provides that "in determining whether the verdict is more favorable to a party than the case evaluation, the court shall consider only the amount of the evaluation and verdict as to the particular pair of parties, rather than the aggregate evaluation or verdict as to all parties." Accordingly, the focus had to be on the evaluation and verdict as between T-M and Oakland, not the evaluation as between OCRC and plaintiff, and the no-cause verdict was more favorable to Oakland than the $45,000 evaluation, which T-M formally rejected and Oakland accepted.

Next, T-M argues that the case evaluation sanctions should not have been awarded because the case did not proceed to trial in the "normal fashion" under MCR 2.403. MCR 2.403(N)(1) provides that when "all or part of the evaluation of the case evaluation panel is rejected, the action proceeds to trial in the normal fashion." Subsection (N) discusses the nature of proceedings following a case evaluation rejection, focusing chiefly on circumstances where a case evaluation panel finds a claim or defense to be frivolous. Subsection (O) governs the liability for costs, and the "normal fashion" language in (N)(1) is entirely irrelevant for purposes of determining sanctions under subsection (O).

None of T-M's arguments are availing, and MCR 2.403(O) required the award of case evaluation sanctions in favor of Oakland.

III. CONCLUSION

In Docket No. 291989, we hold that the trial court erred in denying plaintiff's request for case evaluation sanctions. Further, again in Docket No. 291989, we reject in total OCRC's arguments that the inverse condemnation claim was not ripe for litigation, that there were instructional errors, that the elements of a taking were not established, that it could not be held liable for the negligence of the contractor and subcontractors, that there was prejudicial attorney misconduct, and that it was entitled to remittitur. In Docket No. 292159, we hold that the trial court did not err in directing a verdict against T-M and in favor of OCRC on the third-party indemnification complaint, and we further hold that the jury verdict in favor of the subcontractors Oakland and Owen was not against the great weight of the evidence. T-M's arguments with respect to the judgment against OCRC and in favor of plaintiff on the inverse condemnation claim, which mimic OCRC's arguments, also fail. Finally, in Docket No. 295968, we hold that the trial court did not err in awarding case evaluation sanctions in favor of Oakland and against T-M.

In sum, we affirm in all respects, except that we reverse and remand in regard to the trial court's order denying plaintiff's request for case evaluation sanctions against OCRC. We do not retain jurisdiction. In regard to the taxation of costs under MCR 7.219, plaintiff is entitled to costs as the prevailing party against OCRC, OCRC is entitled to costs as the prevailing party against T-M, and Oakland and Owen are entitled to costs as the prevailing parties against T-M.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Kelly